

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

DRAGAN TODOROVIC,

Petitioner,

vs.

PAUL M. PIERRE; UNITED STATES
CITIZENSHIP AND IMMIGRATION
SERVICES,

Respondents.

CASE NO. 10-CV-1538 JLS (JMA)

**ORDER: GRANTING
RESPONDENTS' MOTION TO
DISMISS**

(Doc. No. 4)

Presently before the Court is Respondents' motion to dismiss Petitioner's petition for review of his application for naturalization. (Doc. No. 4.) Also before the Court are Petitioner's opposition and Respondents' reply. (Doc. Nos. 9 (Opp'n), 10 (Reply).) Having considered the parties' arguments and the law, the Court **GRANTS** Respondents' motion.

BACKGROUND

Petitioner, a native of Yugoslavia and citizen of Serbia, entered the United States in 1997. (Doc. No. 1 (Pet.) ¶ 5.) In 2003, he became a lawful permanent resident. (*Id.*) On April 14, 2008, Petitioner filed a Form N-400 application for naturalization (application). (*Id.* ¶ 8.) On September 11, 2009, United States Citizenship and Immigration Services (USCIS) denied Petitioner's application on the ground that he failed to demonstrate good moral character. (*Id.* ¶ 9; *see* Pet. Ex. B, at 2.) Thereafter, Petitioner filed a timely Form N-336 request for an administrative review of USCIS'

1 decision denying his application. (Pet. Ex. A, at 1.) On April 22, 2010, USCIS upheld the decision
 2 denying Petitioner's application. (*Id.* at 2.) On May 26, 2010, the Department of Homeland Security
 3 placed Petitioner in removal proceedings. (Doc. No. 4-2 to 4-3 (Norris Decl.) Ex. A.) On July 27,
 4 2010, Petitioner filed the instant petition for review of USCIS' decision denying his application. (*See*
 5 Pet.)

6 LEGAL STANDARD

7 Federal Rule of Civil Procedure 12(b)(6) permits a party to raise by motion the defense that
 8 the complaint "fail[s] to state a claim upon which relief can be granted," generally referred to as a
 9 motion to dismiss. The Court evaluates whether a complaint states a cognizable legal theory and
 10 sufficient facts in light of Federal Rule of Civil Procedure 8(a), which requires a "short and plain
 11 statement of the claim showing that the pleader is entitled to relief." Although Rule 8 "does not
 12 require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-
 13 unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, — U.S. —, 129 S. Ct. 1937, 1949 (2009)
 14 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). In other words, "a plaintiff's
 15 obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and
 16 conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*,
 17 550 U.S. at 555 (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). "Nor does a complaint suffice
 18 if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Iqbal*, 129 S. Ct. at 1949
 19 (citing *Twombly*, 550 U.S. at 557). Rule 8 "does not unlock the doors of discovery for a plaintiff
 20 armed with nothing more than conclusions." *Id.* at 1950.

21 "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted
 22 as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at
 23 570); *see also* Fed. R. Civ. P. 12(b)(6). A claim is facially plausible when the facts pled "allow[] the
 24 court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.*
 25 (citing *Twombly*, 550 U.S. at 556). That is not to say that the claim must be probable, but there must
 26 be "more than a sheer possibility that a defendant has acted unlawfully." *Id.* Facts "'merely
 27 consistent with' a defendant's liability" fall short of a plausible entitlement to relief. *Id.* (quoting
 28 *Twombly*, 550 U.S. at 557). Further, the Court need not accept as true "legal conclusions" contained

1 in the complaint. *Id.* This review requires context-specific analysis involving the Court’s “judicial
 2 experience and common sense.” *Id.* “[W]here the well-pleaded facts do not permit the court to infer
 3 more than the mere possibility of misconduct, the complaint has alleged—but it has not
 4 ‘show[n]’—‘that the pleader is entitled to relief.’” *Id.*

5 DISCUSSION

6 Respondents move the Court to dismiss Petitioner’s petition under 8 U.S.C. § 1429 because
 7 Petitioner is currently in removal proceedings and, accordingly, the Court cannot grant him effective
 8 relief. (Doc. No. 4-1 (Mem. ISO MTD), at 3–5.) Petitioner, however, contends that the cases
 9 Respondents rely on in support of their motion are factually inapposite. (Opp’n 2–3.)

10 A person whose application for naturalization is denied “after a hearing before an immigration
 11 officer . . . may seek review of such denial before the United States district court for the district in
 12 which such person resides.” 8 U.S.C. § 1421(c); *accord* 8 C.F.R. § 336.9(b). However, the Attorney
 13 General has “sole authority to naturalize persons as citizens of the United States.” *Id.* § 1421(a). And
 14 under 8 U.S.C. § 1429, “no application for naturalization shall be considered by the Attorney General
 15 if there is pending against the applicant a removal proceeding.” *See Hernandez de Anderson v.*
 16 *Gonzales*, 497 F.3d 927, 933 (9th Cir. 2007) (noting that § 1429 limits Attorney General’s authority
 17 under § 1421(a)).

18 Once USCIS places an alien in removal proceedings, § 1429 limits the scope of a district
 19 court’s review under § 1421(c) and circumscribes the availability of effective remedies. *Zayed v.*
 20 *United States*, 368 F.3d 902, 906 (6th Cir. 2004); *see Bellajaro v. Schlitten*, 378 F.3d 1042, 1046–47
 21 (9th Cir. 2004) (“[W]here . . . the INS has denied an application for naturalization on the basis of
 22 § 1429 because removal proceedings are pending, the district courts have jurisdiction to review the
 23 denial *but the scope of review is limited to ‘such’ denial.*”). While removal proceedings are pending,
 24 a district court cannot order the Attorney General to review the petitioner’s application further, “as
 25 section 1429 expressly prohibits consideration of the application before removal proceedings are
 26 concluded.” *Castaneda v. Holder*, 2009 WL 4282810, at *3 (N.D. Cal. Nov. 25, 2009); *accord Aye*
 27 *Aye Kyi v. Chertoff*, 2008 WL 5131619, at *3 (N.D. Cal. Dec. 5, 2008). And under § 1421(a), the
 28 district court “can neither naturalize [the] petitioner on its own authority nor usurp the authority

1 committed by Congress to the Attorney General by ordering the Attorney General to naturalize an
2 alien without further review.” *Id.* Accordingly, under § 1429 and § 1421(a), a district court cannot
3 provide an alien with effective relief under § 1421(c) once the alien is in removal proceedings. *Id.*;
4 *Aye Aye Kyi*, 2008 WL 5131619, at *3 (“[E]ven if the Court were to conduct a *de novo* review of the
5 Service’s decision to deny Plaintiff’s application, and even if the Court were to determine that the
6 decision was in error, the Court could not grant Plaintiff effective relief”); *see Bellajaro*, 378 F.3d
7 at 1047 (declining to declare petitioner prima facie eligible for naturalization because to do so would
8 be “purely advisory”).

9 Here, the Court is powerless to grant Petitioner effective relief because USCIS has placed him
10 in removal proceedings. Under § 1421(a), the Court cannot naturalize Petitioner on its own authority
11 or order the Attorney General to naturalize Petitioner without further review. And under § 1429, the
12 Court cannot order the Attorney General to reconsider Petitioner’s application because § 1429
13 precludes the Attorney General from considering Petitioner’s application while removal proceedings
14 are pending. Accordingly, Petitioner’s petition fails to state a claim upon which relief can be granted.

15 Petitioner attempts to distinguish *Bellajaro*, *Hernandez de Anderson*, and *Zayed* on the ground
16 that, in those cases, USCIS denied the petitioners’ applications for naturalization because removal
17 proceedings were pending, whereas USCIS denied Petitioner’s application here because he failed to
18 demonstrate good moral character. (Opp’n 2–3.) However, it is not USCIS’ reason for denying
19 Petitioner’s application that renders the Court unable to grant Petitioner effective relief. Rather, it is
20 the fact that Petitioner is now in removal proceedings. Accordingly, the Court concludes that
21 *Bellajaro* and its progeny control. *See Castaneda*, 2008 WL 4282810, at *1, 3 (following *Bellajaro*
22 where USCIS denied petitioner’s application for naturalization because she failed to demonstrate good
23 moral character).

24 //

25 //

26 //

27 //

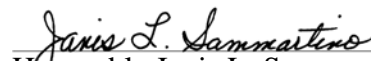
28 //

CONCLUSION

For the reasons stated, the Court **GRANTS** Plaintiff's motion to dismiss.

IT IS SO ORDERED.

DATED: December 20, 2010



Honorable Janis L. Sammartino
United States District Judge